

State of New Hampshire



PERSONNEL APPEALS BOARD

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Appeal of Roger Provost

Docket #2019-T-010

Department of Corrections

December 12, 2019

The New Hampshire Personnel Appeals Board met in public session on Wednesday, October 16, 2019, under the authority of RSA 21-I:58 and Chapters Per-A 100-200 of the NH Code of Administrative Rules, to hear the appeal of Roger Provost, the Appellant. The following commissioners sat for this hearing: Chair Christopher Nicolopoulos, Esq., Vice Chair Normand Patenaude, Esq., and Commissioner Marilee Nihan. Mr. Provost, pro se, appealed his dismissal as a Corrections Officer at the New Hampshire Department of Corrections, State Prison for Men. Assistant Attorney General Eric Bal, appeared on behalf of the Department of Corrections.

The record of the hearing in this matter consists of pleadings filed by the parties prior to the date of the hearing, notices and orders issued by the Board, the audio recording of the hearing on the merits of the appeal and documents admitted into evidence.

THE FOLLOWING PERSONS GAVE SWORN TESTIMONY:

Zachary Colpas, Corrections Officer

Michelle Edmark, Warden of NH State Prison for Men

Roger Provost, Appellant

ISSUES OF LAW:

Per 1002.08 (b) (7)

Per 1002.08 (b) (9)

PPD 1.17

PPD 2.16 (V) (3), (13), (31), & (32)

BACKGROUND:

The Appellant was hired at the Department of Corrections on February 23, 2001 as a Corrections Officer. On the date of his dismissal, the Appellant was a Corporal on the first shift in the Hancock Building Unit at the New Hampshire State Prison for Men.

The Appellant was assigned, along with Corrections Officer Zachary Colpas (hereinafter CO Colpas), to transport an inmate from the New Hampshire State Prison for Men in Concord to the emergency room at Catholic Medical Center in Manchester. During the transport, the Appellant was alleged to have violated several NH Department of Corrections Policy and Procedure Directives as well as Administrative Rules. These actions include, but are not limited to, brake checking while the inmate was in the vehicle, intentionally swerving while the inmate was in the vehicle, getting a beverage at the Dunkin Donuts drive through while en-route to the emergency room, and removing his firearm and setting it on a table in a waiting area in the direction of the inmate.

The Appellant denies brake checking or intentionally swerving the vehicle. The Appellant acknowledges that he stopped at Dunkin Donuts on the way to the emergency room but argues that the inmate did not require urgent care. The Appellant acknowledges that he removed his firearm from its holster but denies he ever pointed it towards the inmate.

After carefully considering the parties' testimony, evidence, and arguments the Board made the following findings of fact and rulings of law.

FINDINGS OF FACT:

1. The Appellant was hired at the Department of Corrections on February 23, 2001, as a Corrections Officer. On the date of his dismissal, the Appellant was a Corporal on the first shift in the Hancock Building Unit at the New Hampshire State Prison for Men. (State's Exhibit #1)
2. On July 13, 2018, the Appellant was directed to secure a State vehicle to drive an inmate to the emergency room at Catholic Medical Center in Manchester. The Appellant secured a vehicle and picked up CO Colpas and the inmate for transport. Shortly after CO Colpas and the inmate were secured in the vehicle, the Appellant abruptly pumped the brakes several times, causing CO Colpas and the inmate in the back seat to "jolt forward." In addition, the Appellant intentionally swerved the vehicle several times, causing the inmate to lose his balance in the back seat. (State's Exhibit #1, #11 and Testimony of CO Colpas).
3. The prison has its own medical facilities, however, if it is determined by medical staff that the on-site facility is not equipped to care for an inmate's needs and it is determined that the inmate is in need of urgent care, the inmate is either transported by a State vehicle or an ambulance to a local hospital. Either way, it had been determined by medical staff that the inmate need urgent care. (Testimony of Warden Edmark)
4. During the transport to the emergency room, the Appellant stopped at Dunkin Donuts for a beverage. CO Colpas believed that stopping at Dunkin Donuts was odd as they were not only transporting an inmate to an emergency room but there is also a Dunkin Donuts inside Catholic Medical Center. (State's Exhibit #11, #8, Testimony of CO Colpas, and the Appellant)
5. PPD 5.28 (Transportation of Inmates) section IV (D) (1), states, in relevant part, "When medical authorities have determined that immediate transport to a hospital is required, this move takes priority over all other activities." (State's Exhibit 8)

6. While the inmate was being checked in to the emergency room, the Appellant repeatedly tapped on the inmate's head. It is believed that this behavior was not meant to hurt the inmate but to antagonize him. (Testimony of CO Colpas)

7. PPD 2.16 (Rules and Guidance for DOC Employees) V (13) (Abuse of a Person Under Departmental Control) states, in relevant part, " Any employee who assaults or strikes a person under departmental control, subjects them to improper punishment or deprives them of benefits without justifiable cause may be charged with abuse of a person under departmental control and is in violation of this policy."

8. After the inmate was checked in at the hospital, the Appellant, CO Colpas, and the inmate were escorted to a private waiting area. During this time, the Appellant admittedly removed his firearm from its holster. The Appellant placed it on the table in the direction of the inmate and stated something to the effect of "try something now." After approximately 30 seconds, the Appellant reholstered his firearm. These actions not only violated NH Department of Corrections Policy and Procedure Directive 5.20 but firearms training as well. The Appellant successfully completed firearms training annually. (State's Exhibit #7, Testimony of CO Colpas and the Appellant)

9. While waiting for the Appellant to be seen by medical personnel, the Appellant showed CO Colpas inappropriate photographs of women on his cell phone (e.g. a photograph of a woman's naked buttocks). The Appellant argued that the photographs he showed CO Colpas were not pornographic in nature because they did not show "genitalia or nipples." Further, the Appellant scrolled through his personal phone to pass the time while waiting for the inmate to be seen by medical staff. (Testimony of CO Colpas)

10. PPD 2.16 (Rules and Guidance for DOC Employees) V (32) (Attention to Duty) states, in relevant part, "Employees are required to give their entire time and attention to their duties during their hours of employment. Employees shall not engage in distracting amusement or occupation while on duty." (State's Exhibit # 3)

11. PPD 2.16 (Rules and Guidance for DOC Employees) V (33) (Performance of assigned duties) states, "Every employee shall be held responsible for the efficient punctual performance of all duties assigned and for the proper supervision of persons under departmental control." (State's Exhibit #3)

12. PPD 2.16 (Rules and Guidance for DOC Employees) V (3) (Dereliction of Duty) states, in relevant part, "Employees are derelict in their duties when they willfully or negligently fail to perform them, or when they perform them in a culpably inefficient manner. A duty may be imposed by regulation, lawful order, policy statement, or custom." (State's Exhibit #3)

13. PPD 1.17 (Agency Mission), the Mission Statement of the NH Department of Corrections states, "Our mission is to provide a safe, secure and humane correctional system through effective supervision and appropriate treatment of offenders and a continuum of service..." Further, PPD 1.17 includes a "Core Values Statement" which states, in part, "Integrity: We adhere to the highest ethical standards and accept responsibility for our decisions and actions". "Respect: We treat all employees, offenders, and the public with fairness, honesty, and dignity..." (State's Exhibit #2)

RULINGS OF LAW:

- A. Per 1002.08 (b) (7) an appointing authority may dismiss an employee without prior warning for the offenses such as, but not necessarily limited to, the following: Violation of a posted or published state or agency policy or procedures, or of a law or administrative rule applicable to the agency.
- B. Per 1002.08 (b) (9) An appointing authority may dismiss an employee without prior warning for offenses such as, but not necessarily limited to, the following: Endangering the life, health or safety of another employee or individual served by the agency.
- C. PPD 1:17: Agency Mission.

D. PPD 2.16: Rules and Guidance for DOC Employees.

E. Per-A 207.12 (b) In disciplinary appeals, including termination, disciplinary demotion, suspension without pay, withholding of an employee's annual increment or issuance of a written warning, the board shall determine if the appellant proves by a preponderance of the evidence that (1) the disciplinary action was unlawful, (2) the appointing authority violated the rules of the division of personnel by imposing the disciplinary action under appeal, (3) the disciplinary action was unwarranted by the alleged conduct or failure to meet the work standard in light of the facts in evidence, and (4) the disciplinary action was unjust in light of the facts in evidence.

DISCUSSION and ORDER:

On July 13, 2018, the Appellant was ordered to transport an inmate from the prison to the emergency room at Catholic Medical Center. Once the inmate was in the vehicle, the Appellant began to abruptly pump the brakes, causing the inmate to jolt forward in his seat. In addition, the Appellant swerved the vehicle back and forth, causing the inmate to lose his balance. The Board did not find the Appellant credible when he argued that he routinely brake checks a vehicle and swerves a vehicle several times to ensure it is safe for the road. The Board believes the Appellant did this to antagonize the inmate and possibly injure the inmate. This behavior violates Administrative Rule 1002.08 (b) (9) in that it endangered the life, health, or safety of CO Colpas and the inmate.

The Appellant admitted that he stopped at Dunkin Donuts during the time he was transporting the inmate from the prison to the emergency room. The Appellant argued that it was not a true emergency as true emergent cases are transported via ambulance to Concord Hospital. The Appellant does not work in the medical services department and the determination of what is a true emergency is not for him to make. After all, he was transporting an inmate to the emergency room (emphasis added). PPD 5.28 IV (D) (1) states that when medical authorities determine that immediate transport to a hospital is required, the transport shall take priority over all other activities. The Board finds this to include stopping at Dunkin Donuts for a beverage.

While at the hospital, the Appellant tapped on the inmate's head an unknown number of times. The Board can think of no reason why the Appellant would do such a thing other than to try and antagonize the inmate. This is unprivileged physical contact, regardless if the inmate was injured or not, violates PPD 2.16 (V) (13), (V) (33).

While the inmate was waiting to be evaluated by hospital staff, the Appellant removed his firearm from its holster and set it on the table with the barrel facing the inmate. The Appellant explained that he was looking at the serial number on the firearm. The Board believes that the Appellant removed his firearm to intimidate, threaten, and frighten the inmate. The Board finds that this behavior was a not only a danger to the inmate, but the public and hospital staff as well. The Appellant showed a complete disregard for firearm safety. Even if the firearm was not pointed directly at the inmate, it could have accidentally discharged and could have resulted in injury or death to someone on the other side of the wall of the waiting area. The Board found the Appellant's actions to be reckless and in violation of PPD 5.20 and Administrative Rule 1002.08 (b) (9).

While waiting for the inmate to be evaluated by hospital staff, the Appellant was showing CO Colpas pictures of partially nude women and he was also scrolling through his personal phone to pass time. PPD 2.16 (V) (32) states, in relevant part, "Employees are required to give their entire time and attention to their duties during their hours of employment. Employees shall not engage in distractive amusement or occupation while on duty. The Appellant showing CO Colpas these pictures and scrolling through his phone to pass the time is a clear violation of PPD 2.16. The Appellant was not giving his entire attention to his duty to ensure the inmate was secure.

For the foregoing reasons, the Board voted unanimously to DENY the appeal.

THE PERSONNEL APPEALS BOARD



Chair Christopher Nicolopoulos, Esq.



Vice-Chair Norman Patenaude, Esq.



Commissioner Marilee Nihan

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